SERVED: April 7, 1994

NTSB Order No. EA-4132

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 24th day of March, 1994

DAVID R. HINSON, Administrator, Federal Aviation Administration, Complainant, v. JAMES WEBSTER DILLON, Respondent.	)	Docket SE-12487

OPINION AND ORDER

Respondent has appealed from the oral initial decision of Administrative Law Judge Jerrell Davis, issued at the conclusion of an evidentiary hearing in this case on July 14, 1992.[1] In that decision, the law judge affirmed the Administrator's order suspending respondent's airline transport pilot certificate, with

[1] Attached is an excerpt from the hearing transcript containing the oral initial decision.

waiver of penalty,[2] based on his deviation from an air traffic control (ATC) altitude clearance, in violation of 14 C.F.R. 91.123(a) and 91.13(a).[3] For the reasons discussed below, we deny respondent's appeal and affirm the initial decision.

On November 30, 1990, respondent acted as the non-flying pilot-in-command of a United Express passenger-carrying flight being operated by Westair Commuter Inc., on a flight from Seattle, Washington, to Eugene, Oregon. As the non-flying pilot, respondent was responsible for handling radio operations while the first officer operated the flight controls. It is undisputed that approximately 50 miles from the destination airport in Eugene, respondent's flight received an ATC clearance to descend

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[2] In light of respondent's timely filing of a report of this incident under the Aviation Safety Reporting Program (ASRP), the Administrator waived imposition of any actual certificate suspension, pursuant to the terms of that program.

[3] Section 91.123(a) provides:

§ 91.123 Compliance with ATC clearances and instructions.

(a) When an ATC clearance has been obtained, no pilot in command may deviate from that clearance, except in an emergency, unless an amended clearance is obtained. A pilot in command may cancel an IFR flight plan if that pilot is operating in VFR weather conditions outside of positive controlled airspace. If a pilot is uncertain of the meaning of an ATC clearance, the pilot shall immediately request clarification from ATC.

Section 91.13(a) provides:

§ 91.13 Careless or reckless operation.

(a) *Aircraft operations for the purpose of air navigation.* No person may operate an aircraft in a careless or reckless manner so as to endanger the life or property of another.

from 17,000 feet to 14,000 feet, and that the flight deviated from this clearance by descending to 13,200 feet, thus bringing it into conflict with another aircraft.[4] The unauthorized descent was halted only after an air traffic controller contacted the flight to confirm the 14,000-foot clearance.

Respondent maintains that he should not be held responsible for the deviation because he was occupied with unforeseeable essential safety-related duties at the time, and reasonably relied[5] on his first officer to adhere to the altitude clearance. Specifically, respondent contends that a sudden and unanticipated deterioration in weather conditions (including significantly reduced visibility and increased winds) at the planned destination airport -- discovered only 9 or 10 minutes before the flight's projected landing there[6] -- required him to

[4] According to respondent, the first officer "had no better explanation [for his unauthorized continued descent below 14,000 feet] than that he simply screwed up." (Tr. 47.) Respondent represented, without contradiction from the Administrator, that the first officer did not appeal from the FAA's order of suspension with waiver of penalty issued to him as a result of this incident. (Tr. 47-48.) The first officer did not testify in this proceeding.

[5] We note that, although respondent couches his defense in terms of his asserted "reasonable reliance" on his first officer, the Administrator contends that term is inapplicable and characterizes respondent's conduct as an abandonment, or improper delegation, of his duty to monitor altitude.

[6] Respondent became aware of this sudden change in weather when the automatic terminal information service (ATIS) radio frequency began to broadcast a "special" weather observation from the airport at 9:12 a.m., indicating a significant change from the normal hourly observation made at 8:50 a.m. According to respondent, this change in the reported weather information occurred just as the aircraft began its descent from 17,000 feet. The Administrator does not dispute that the weather changed

immediately consult airport instrument approach plates and aircraft performance data in order to determine whether the flight could still safely land at that airport, or whether it would be necessary to divert the flight to an alternate airport. He argues that he could not have performed these important safety duties while simultaneously monitoring the aircraft altimeter. We disagree.

As the pilot-in-command, respondent had a general duty to monitor the safety of the flight,[7] and a specific duty to insure compliance with ATC altitude clearances.[8] Further, as the non-flying pilot, respondent was also required by the United Express manual to monitor and call out the aircraft's altitude at 1,000 feet, and 500 feet, prior to reaching the assigned altitude, and also to call out any deviation from that assigned altitude. Respondent testified that he did in fact make altitude call-outs at 15,000 feet and at 14,500 feet in accordance with this policy, thus demonstrating that he was capable of briefly interrupting his review of the approach and performance data to perform this simple,[9] but vital, duty. However, he thereafter abandoned this critical duty and was unaware that the aircraft had descended

(..continued)
dramatically, or that respondent could not have learned of the changed conditions any earlier in the flight.

[7] Administrator v. Rheudasil, 5 NTSB 400, 401 (1988).

[8] 14 C.F.R. 91.123(a).

[9] Respondent indicated that both pilots in the cockpit had an altimeter, located at approximately eye level in the instrument panel. (Tr. 39, 67-8.)

below its clearance until he was notified by ATC some (by respondent's own estimate) 45 seconds after his required 14,500 foot altitude call-out.[10] Respondent does not contend that his review of the approach and performance data demanded more of his time and attention after the aircraft passed through 14,500 than before. Thus, while we find no fault with respondent's decision to review the approach plates and performance data immediately upon learning of the deteriorating weather at his destination airport,[11] we reject his contention that he was thereby excused from his obligation to monitor the aircraft's altitude.

As noted by the law judge, respondent, as the holder of an ATP certificate, is held to "the highest degree of care."[12] In light of this high standard of care, and his status as the pilot-in-command of a passenger-carrying flight in air transportation, we do not think it unreasonable to expect him to continue to monitor the aircraft's altitude while evaluating the possible

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[10] Accordingly, given this **45-second** abandonment of his altitude-monitoring duty, this case is unlike Charles A. Hazen, 26 CAB 824 (1958), where the Civil Aeronautics Board found that a pilot-in-command could rely on his co-pilot to properly execute a missed approach during the **three or four seconds** that it took the pilot to retract the landing gear, a required duty which necessitated a temporary diversion from his observation of the instrument panel. Respondent cites Hazen for the proposition that verbal conduct is not the only basis for the "reasonable reliance" defense.

[11] The Administrator suggests in his brief that respondent could have delayed his review of this material until after the aircraft had levelled off at 14,000 feet.

[12] See Administrator v. Baughman, NTSB Order No. EA-3563 at 3, n. 7 (1992); Administrator v. Moore, NTSB Order No. EA-3946 at 6, n. 14 (1993).

impact of the changed weather conditions on the flight. While we recognize that it may not always be easy for a pilot-in-command to juggle important flight duties, we think that respondent's reliance on his first officer to comply with the altitude clearance by levelling off at 14,000 feet, without his continued supervision, was both unwise and inconsistent with respondent's duty to exercise the highest degree of care.

In conclusion, we find the law judge's reference in his initial decision to our language in Administrator v. Frederick and Ferkin, NTSB Order No. EA-3600 at 6-7 (1992) on point, and worth repeating here:

> Respondents are charged with the highest degree of care, and they were capable at all relevant times during the flight of comparing their . . . altimeters to the cleared altitude. Neither's other duties were so extensive or more significant that such a fundamental matter as altitude clearance might be justifiably ignored, especially during ascent and descent.
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> Ascending . . . at 3,600 feet per minute,[13] respondents should have been exceedingly alert to the aircraft's altitude and the period of time it would take until it began to level off. Whether they failed adequately to monitor altitude because they relied too heavily on the autopilot, or because they did not scan the altimeters frequently enough, or because they did scan the altimeters but did not appreciate the significance of the readout is irrelevant. Whatever the reason, the result reflects less than the highest degree of care of a reasonable and prudent pilot.

(Tr. 113-14.) (Footnotes in original text omitted.)

[13] Respondent testified that a typical descent rate for the aircraft involved in this case is approximately 1,500 to 2,000 feet per minute. (Tr. 70.) This difference in descent rates does not detract from the relevance of our comments in Frederick and Ferkin to this case.

ACCORDINGLY, IT IS ORDERED THAT:

1. Respondent's appeal is denied; and

2. The initial decision is affirmed in its entirety.

VOGT, Chairman, COUGHLIN, Vice Chairman, LAUBER, HAMMERSCHMIDT, and HALL, Members of the Board, concurred in the above opinion and order.